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IN THE

# SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1973

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NO. 73-401

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FRANK GUY MITCHELL,

*Petitioner*

VS.

THE STATE OF TEXAS,

*Respondent*

• • •

On Petition for Writ of Certiorari
to the Court of Criminal
Appeals of Texas

• • •

## RESPONDENT'S BRIEF IN OPPOSITION

• • •

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## RESPONDENT'S BRIEF IN OPPOSITION

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## OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, for which review is sought here, is reported in *Mitchell v. State*, 494 S.W. 2d 865 (1973). A copy of the opinion is attached to the petition herein.

## JURISDICTION

The formal jurisdictional requisities of the petition and its timely filing would appear to be satisified, although Respondent disputes Petitioner's contention that any rights guaranteed by the Constitution of the United States have been denied.

## QUESTIONS PRESENTED

Respondent disagrees with the Questions Presented by Petitioner because they assume facts which do not appear in the record, namely that there is proof of indigency of Petitioner at his prior conviction and that Petitioner was not represented by counsel at the time of his prior conviction.

Respondent asserts that the following two questions should constitute the Questions presented in this cause:

1. Does the principle of *Burgett v. Texas* apply to cases in which there is a lack of a proof of indigency at the time of the prior counseless conviction?

2. Whether the prior conviction complained of was actually obtained at a time when Petitioner was not represented by counsel and did not waive counsel, and thereby denied Petitioner's Sixth Amendment right to counsel and Fourteenth Amendment rights to due process and equal protection of the law?

## CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the Sixth and Fourteenth Amendment to the United States Constitution are involved here.

## STATEMENT OF THE CASE

Petitioner was indicted as an habitual criminal and charged with the offense of theft from the person. He entered a plea of not guilty before a jury in the 176th District Court of Harris County, Texas, and was found guilty as charged in the indictment. Thereafter, the same jury heard evidence on the enhancement allegations of the indictment and found that Petitioner was the same person who had been convicted twice before of felonies as alleged in the indictment. The court assessed punishment as required by law at confinement in the Texas Department of Corrections for life.

At the punishment stage of Petitioner's trial, Petitioner objected to the introduction of evidence of first prior conviction because he contended that he had no attorney in that case at the time he pled guilty and that he was not advised of his right to an attorney. The petition herein contains an accurate reproduction of Petitioner's testimony at page 3 of the petition.

The State then introduced "pen papers" from the Texas Department of Corrections. Those papers contained copies of the judgment and sentence in Petitioner's first prior conviction. That judgment affirmatively states that the "defendant, Frank Guy Mitchell, appeared in person, his counsel also being present . . . " A copy of this judgment appears in Appendix A of Respondent's Brief in Opposition.

On appeal, the Court of Criminal Appeals of Texas held that "the judgment in that cause [Petitioner's first prior conviction] recites that 'Frank Guy Mitchell appeared in person, his counsel also being present . . . ' Further, appel-

lant has raised no issue of indigency as of the time of the prior trial" and his contention is "without merit."

## ARGUMENT AND AUTHORITIES

**1. The principle of Burgett v. Texas does not apply to cases in which there is a lack of a proof of indigency at the time of the prior counseless conviction.**

The record does not reflect that Petitioner ever testified that he was indigent and unable to secure counsel at the time of his first prior conviction. Petitioner does not now advance such a claim of indigency.

Since there is in the instant case no proof of Petitioner's indigency at the time of his first prior conviction, the court which heard that case should not be considered to have denied an indigent defendant the help of an attorney.

Petitioner seeks to have this Court apply the principle of *Burgett v. Texas*, 389 U.S. 109 (1967), to cases which do not involve an indigent defendant. To do this would be to misread and to misapply the test set out in *Burgett* concerning the right to counsel. The Court in *Burgett* held that "*Gideon v. Wainwright* established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth Amendment, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one." *Burgett v. Texas*, 389 U.S. 109 (1967).

Two tests are thus established by the *Burgett* interpretation of *Gideon*: a person must (1) have had a lawyer or (2) have validly waived one.

It is logical to limit the *Burgett* principle to indigent defendants because by so doing the courts are able to comply with the first test set out in the *Burgett* interpretation of *Gideon*, i. e., that the defendant had a lawyer. Implicit in the concept of "having a lawyer" is the concept of having the ability to pay for a lawyer. If the defendant cannot pay for a lawyer's services, he cannot have a lawyer unless the court appoints one for him.

It is essential that the court know that a defendant cannot afford a lawyer, so that a lawyer may be appointed. If the defendant never raises the issue of his indigency, of his inability to hire a lawyer, the court should not be held to have violated his constitutional rights by not appointing him a lawyer. If defendants were to receive court-appointed counsel without a showing of indigency, defendants who could afford to retain counsel could avoid having to do so simply by remaining silent as to their financial condition.

The Court of Criminal Appeals of Texas was correct therefore, in holding that the rule of *Burgett* applies only to indigent defendants:

> "*Burgett v. Texas* . . . is based on *Gideon v. Wainwright* . . . Gideon is bottomed on the premise of indigency. Without such a showing, the question [of absence of counsel] is not before us." *Hudson v. State*, 453 S.W. 2d 147, 148 (Tex.Crim., 1970).

The Court of Criminal Appeals of Texas has repeatedly held that in order to secure a favorable ruling under *Burgett*, it is necessary that a showing of indigency be made. *Walling v. State*, 437 S.W. 2d 563, (Tex.Crim., 1969); *Lott v. State*, 480 S.W. 2d 743 (Tex.Crim., 1972).

Petitioner's proposed "simple constitutional rule"—that, in the absence of waiver, a felony is invalid if it was obtained in a court that denied the defendant the help of a lawyer—ignores the fact that the court cannot deny the defendant an attorney if he is indigent and that the defendant can retain counsel if he is not indigent.

**2. A prior conviction used to enhance Petitioner's punishment to life imprisonment was obtained at a time when Petitioner was represented by counsel and did not thereby deny Petitioner's Sixth Amendment right to counsel and Fourteenth Amendment rights to due process and equal protection of the law.**

Petitioner contends that a prior felony conviction, which he alleges was void because he was not represented by counsel, was improperly used to enhance his punishment under Article 63, P. C. It is respectfully submitted that the record fails to support Petitioner's contention.

The prior conviction about which complaint is made and which was alleged in the enhancement count in the indictment was a conviction obtained in Cause No. 5823, obtained on April 9, 1956, in the 12th District Court of Trinity County, Texas. The judgment and sentence entered in that cause were introduced into evidence at the punishment stage of Petitioner's trial. That judgment affirmatively states that the "defendant Frank Guy Mitchell appeared in person, his counsel also being present . . . " Petitioner contends, however, that because the name of his counsel in Cause No. 5823 was not inserted in the judgment that the same is void on its face.

Petitioner relies on *Burgett v. Texas*, 389 U.S. 109 (1967), to support his claim of error. Petitioner's reliance

on the ruling in *Burgett* is misplaced in the light of the record in the instant case. In *Burgett*, the use of the prior conviction was banned because it was presumptively void on its face. The first version of the prior conviction in *Burgett* recited that the defendant appeared "in proper person and without counsel." The second version of the same prior conviction which was admitted to evidence stated that the petitioner appeared "in proper person" but did not contain the additional words, "without counsel." In the instant case, on the contrary, the judgment in the prior conviction used for enhancement affirmatively, states that "defendant appeared in person, his counsel also being present." Such a judgment is not presumptively void on its face as is required for the application of the *Burgett* rule. There is nothing in *Burgett* to suggest that the counsel for defendant, who was thus shown to be present, must be named in the judgment.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
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## CERTIFICATE OF SERVICE

I, John Pierce Griffin, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been deposited in the United States mail, postage prepaid, certified, on this the _____ day of December, 1973, addressed as follows: Mr. Dick DeGuerin, Foreman & DeGuerin, 512 1st National Life Bldg., Houston, Texas 77002.

JOHN PIERCE GRIFFIN
Assistant Attorney General

THE STATE OF TEXAS

vs.

FRANK GUY MITCHELL

IN THE DISTRICT COURT

No. 5827 TRINITY County.

Charge BURGLARY

Date APRIL 9th 1956

This day this cause was called for trial, and the State appeared by her district Attorney, and the Defendant Frank Guy Mitchell appeared in person, his counsel also being present

and the Defendant Frank Guy Mitchell having been duly arraigned in open court, both parties announced ready for trial, and the Defendant

in open Court, in person, pleaded guilty to the charge contained in the indictment; thereupon the said Defendant was admonished by the Court of the consequences of said plea, and the said Defendant persisted in pleading guilty; and it plainly appearing to the Court that the said Defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon, prompting him to confess his guilt, the said plea of guilty is by the Court received, and here now entered of record upon the minutes of the Court as the plea herein of said Defendant; thereupon a Jury of good and lawful men, to-wit: was waived and the Cause submitted to and eleven others was duly selected, impaneled and sworn, who, having heard the indictment read, and the Defendant's plea of GUILTY thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider of their verdict, and afterwards was brought into open Court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, towit: to the Court; Whereupon the Court having heard the pleadings and the evidence offered is of the opinion therefrom that thedefendant is guilty of the offense charged against him

/s/ Max M. Rogers

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT, That the Defendant Frank Guy Mitchell is guilty of the offense of Burglary as confessed by him in his said plea of GUILTY herein made and as found by the Court, and that he be punished by confinement in the State penitentiary for a term of Two years

and that the State of Texas do have and recover of the said Defendant Frank Guy Mitchell all costs in this prosecution expended, for which execution will issue.